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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

CHASOM BROWN, MARIA NGUYEN,  
and WILLIAM BYATT, individually and on  
behalf of all similarly situated,

Plaintiffs,

v.

GOOGLE LLC and ALPHABET INC.,  
Defendants.

Case No. 5:20-cv-03664-LHK

**DEFENDANT'S REQUEST FOR JUDICIAL  
NOTICE IN SUPPORT OF MOTION TO  
DISMISS PLAINTIFFS' COMPLAINT**

Judge: Honorable Lucy H. Koh

Date: December 4, 2020

Time: 1:30 p.m.

Courtroom: 8, 4th Floor

Judge: Honorable Lucy H. Koh

**DEFENDANT’S REQUEST FOR JUDICIAL NOTICE**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT pursuant to Federal Rule of Evidence 201, Defendant Google LLC (“Google”) respectfully requests that the Court take judicial notice of the following documents for purposes of ruling on Defendant’s Motion to Dismiss Plaintiffs’ Complaint, filed concurrently herewith:

1. Screenshot of desktop browser version of Chrome’s “You’ve gone incognito” pop-up screen, which is attached to the Declaration of Andrew H. Schapiro (“Schapiro Declaration”) as **Exhibit 1**.

2. Screenshot of mobile device version of Chrome’s “You’ve gone incognito” pop-up screen, which is attached to the Schapiro Declaration as **Exhibit 2**.

3. Google’s Privacy Policy in effect between March 25, 2016 and June 28, 2016, which is available online at <https://policies.google.com/privacy/archive/20160325> and is attached to the Schapiro Declaration as **Exhibit 3**.

4. Google’s Privacy Policy in effect between June 28, 2016 and August 29, 2016, which is available online at <https://policies.google.com/privacy/archive/20160628> and is attached to the Schapiro Declaration as **Exhibit 4**.

5. Google’s Privacy Policy in effect between August 29, 2016 and March 1, 2017, which is available online at <https://policies.google.com/privacy/archive/20160829> and is attached to the Schapiro Declaration as **Exhibit 5**.

6. Google’s Privacy Policy in effect between March 1, 2017 and April 17, 2017, which is available online at <https://policies.google.com/privacy/archive/20170301> and is attached to the Schapiro Declaration as **Exhibit 6**.

7. Google’s Privacy Policy in effect between April 17, 2017 and October 2, 2017, which is available online at <https://policies.google.com/privacy/archive/20170417> and is attached to the Schapiro Declaration as **Exhibit 7**.

1           8.       Google's Privacy Policy in effect between October 2, 2017 and December 18, 2017,  
2 which is available online at <https://policies.google.com/privacy/archive/20171002> and is attached to  
3 the Declaration as **Exhibit 8**.

4           9.       Google's Privacy Policy in effect between December 18, 2017 and May 25, 2018,  
5 which is available online at <https://policies.google.com/privacy/archive/20171218> and is attached to  
6 the Schapiro Declaration as **Exhibit 9**.

7           10.      Google's Privacy Policy in effect between May 25, 2018 and January 22, 2019, which  
8 is available online at <https://policies.google.com/privacy/archive/20180525> and is attached to the  
9 Schapiro Declaration as **Exhibit 10**.

10          11.      Google's Privacy Policy in effect between January 22, 2019 and October 15, 2019,  
11 which is available online at <https://policies.google.com/privacy/archive/20190122> and is attached to  
12 the Schapiro Declaration as **Exhibit 11**.

13          12.      Google's Privacy Policy in effect between October 15, 2019 and December 19, 2019,  
14 which is available online at <https://policies.google.com/privacy/archive/20191015> and is attached to  
15 the Schapiro Declaration as **Exhibit 12**.

16          13.      Google's Privacy Policy in effect between December 19, 2019 and March 31, 2020,  
17 which is available online at <https://policies.google.com/privacy/archive/20191219> and is attached to  
18 the Schapiro Declaration as **Exhibit 13**.

19          14.      Google's Privacy Policy in effect between March 31, 2020 and July 1, 2020, which is  
20 available online at <https://policies.google.com/privacy/archive/20200331> and is attached to the  
21 Schapiro Declaration as **Exhibit 14**.

22          15.      Google's current Privacy Policy in effect on July 1, 2020, which is available online at  
23 <https://policies.google.com/privacy> and is attached to the Schapiro Declaration as **Exhibit 15**.

24          16.      Google's Terms of Service in effect between April 14, 2014 and October 25, 2017,  
25 which is available online at <https://policies.google.com/terms/archive/20140414> and is attached to the  
26 Schapiro Declaration as **Exhibit 16**.

1           17.     Google’s Chrome Privacy Notice archived on June 21, 2016, which is available online  
2 at <https://www.google.com/chrome/privacy/archive/20160621/> and is attached to the Schapiro  
3 Declaration as **Exhibit 17**.

4           18.     “Search & browse privately” page from Google Help Center for computer devices,  
5 which is available online at  
6 <https://support.google.com/websearch/answer/4540094?co=GENIE.Platform%3DDesktop> and is  
7 attached to the Schapiro Declaration as **Exhibit 18**.

8           19.     “How private browsing works in Chrome” page from Google Chrome Help Center for  
9 computer devices, which is available online at  
10 <https://support.google.com/chrome/answer/7440301?co=GENIE.Platform%3DDesktop> and is  
11 attached to the Schapiro Declaration as **Exhibit 19**.

12           20.     “Browse in private” page from Google Chrome Help Center for computer devices,  
13 which is available online at  
14 <https://support.google.com/chrome/answer/95464?co=GENIE.Platform%3DDesktop&hl=en> and is  
15 attached to the Schapiro Declaration as **Exhibit 20**.

16           21.     “Safeguarding your data” page from Google Analytics Help Center, which is available  
17 online at <https://support.google.com/analytics/answer/6004245> and is attached to the Schapiro  
18 Declaration as **Exhibit 21**.

19           22.     “Policy requirements for Google Analytics Advertising Features” page from Google  
20 Analytics Help Center, which is available online at  
21 <https://support.google.com/analytics/answer/2700409> and is attached to the Schapiro Declaration as  
22 **Exhibit 22**.

23           23.     “Measurement Protocol, SDK, and User ID Feature Policy” page from Google  
24 Analytics Measurement Protocol Guides, which is available online at  
25 <https://developers.google.com/analytics/devguides/collection/protocol/policy> and is attached to the  
26 Schapiro Declaration as **Exhibit 23**.

24. “Google Publisher Policies” page from Google Ad Manager Help Center, which is available online at <https://support.google.com/adsense/answer/1348695> and is attached to the Schapiro Declaration as **Exhibit 24**.

25. “Platforms program policies” page from Google’s Platforms Policies Help Center, which is available online at <https://support.google.com/platformspolicy/answer/3013851> and is attached to the Schapiro Declaration as **Exhibit 25**.

### **MEMORANDUM OF POINTS AND AUTHORITIES**

The documents listed above are properly the subject of judicial notice and the Court should consider them when ruling on Google’s Motion to Dismiss.

#### **I. LEGAL STANDARD**

The Supreme Court has directed that upon a motion to dismiss, a court “must consider the complaint in its entirety, as well as . . . documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Courts may take judicial notice of facts that are “not subject to reasonable dispute because [they] . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2). Courts “must take judicial notice if a party requests it and the court is supplied with the necessary information.” Fed. R. Evid. 201(c)(2).

In ruling on a motion to dismiss, a court may take judicial notice of a document explicitly mentioned in the complaint or even a document “not explicitly refer[red] to” in a complaint but which “the complaint necessarily relies upon.” *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010). “Under the ‘incorporation by reference’ doctrine in this Circuit, a court may look beyond the pleadings without converting the Rule 12(b)(6) motion into one for summary judgment.” *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1160 (9th Cir. 2012) (internal quotation marks and citations omitted). The doctrine aims to “prevent[] plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting . . . documents upon which their claims are based.” *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (internal quotation marks omitted). “The rationale of the ‘incorporation by reference’ doctrine applies with equal force to internet pages as it does to printed material.” *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (incorporating web pages submitted

1 with a motion to dismiss); *see also Davis*, 691 F.3d at 1160-61 (affirming decision to incorporate web  
 2 pages referenced by complaint). Publically accessible websites are “[p]roper subjects of judicial  
 3 notice when ruling on a motion to dismiss.” *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1190, 1204  
 4 (N.D. Cal. 2014) (Koh, J.) (taking judicial notice of web pages).

## 5 **II. THE COURT SHOULD TAKE JUDICIAL NOTICE OF THE EXHIBITS**

6 Google seeks judicial notice of the following documents: Google’s Chrome “You’ve gone  
 7 incognito” notice (Exs. 1-2), Google’s Privacy Policy (Exs. 3-15), Google’s Terms of Service  
 8 (Ex. 16), Google’s Chrome Privacy Notice (Ex. 17), Google disclosures about “private browsing”  
 9 (Exs. 18-20), and Google policies relating to analytics and advertising services (Exs. 21-25). All  
 10 Exhibits but the four Google policies relating to analytics and advertising services (Exs. 22-25) are  
 11 incorporated by reference in the Complaint, and all are subject to judicial notice as they appear on  
 12 publicly available websites and “can be accurately and readily determined from sources whose  
 13 accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2). Courts routinely take judicial  
 14 notice of these materials. *E.g., In re Google Assistant Privacy Litig.*, 2020 WL 2219022, at \*4-5  
 15 (N.D. Cal. May 6, 2020) (taking judicial notice of Google’s Terms of Service, Privacy Policy, and a  
 16 Google blog post for purposes of motion to dismiss); *Matera v. Google Inc.*, 2016 WL 5339806, at \*7  
 17 (N.D. Cal. Sept. 23, 2016) (Koh, J.) (taking judicial notice of Google’s Terms of Service, “various  
 18 versions of Google’s Privacy Policy,” and Google’s website entitled “Updates: Privacy Policy” for  
 19 purposes of motion to dismiss).

### 20 **A. Exhibits 1 through 21 to the Schapiro Declaration Are Incorporated by Reference**

21 Exhibits 1 through 21 are properly considered on a motion to dismiss because they are  
 22 incorporated by reference in the Complaint.

23 The Complaint directly cites to Exhibits 3 through 16 and 18: Google’s Privacy Policy, Terms  
 24 of Service, and “Search & Browse Privately” page. *See, e.g. Id.* ¶ 30 (“Google’s Privacy Policy  
 25 explicitly states . . .”); *Id.* ¶ 103 (“Defendants’ own Terms of Service explicitly state . . .”); *Id.* ¶ 33  
 26 (“On the ‘Search & Browse Privately’ page, Google once again . . .”). Because these documents are  
 27 expressly referenced and quoted in the Complaint, they are all properly considered under the  
 28 incorporation by reference doctrine and the Court should take judicial notice of their contents. *See In*

1 *re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1405 n.4 (9th Cir. 1996) (judicially noticing the full text of a  
 2 document, including portions not mentioned in the complaint). Although it is unclear which version  
 3 of the Privacy Policy are being referenced, because Plaintiffs’ allege a Class Period from June 2016 to  
 4 the present, the Court should take judicial notice of each version of the Privacy Policy (Exs. 3-15) in  
 5 effect during that period.

6 A court may also take judicial notice of a document “not explicitly refer[red] to” in a  
 7 complaint but which “the complaint necessarily relies upon.” *Coto*, 593 F.3d at 1038 (judicially  
 8 noticing a billing agreement where the complaint necessarily relied upon its terms). This rule exists  
 9 “in order to ‘[p]revent [] plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting . . .  
 10 documents upon which their claims are based . . . .’” *Swartz*, 476 F.3d at 763 (quoting *Parrino v.*  
 11 *FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998) (judicially noticing insurance terms of service and  
 12 administrative documents because the claim necessarily relied on plaintiff having been a member of  
 13 the insurance plan)). Exhibits 1, 2, 17, and 19 through 21 are not explicitly referenced in the  
 14 Complaint but should be judicially noticed because Plaintiffs’ Complaint necessary relies on them, for  
 15 the reasons below.

16 Exhibits 1 and 2 depict the Chrome “You’ve gone incognito” just-in-time disclosure shown to  
 17 a user every time he or she turns on Chrome’s Incognito mode. Plaintiffs’ claims are based on  
 18 allegations that Google’s disclosures contained misrepresentations about private browsing (Compl. ¶¶  
 19 29-36) and specifically allege that they used Chrome’s Incognito mode (Compl. ¶¶ 81, 86, 91). That  
 20 Plaintiffs deliberately omit mention of these disclosures – despite their centrality to Plaintiffs’ claims  
 21 – is not dispositive. Plaintiffs cannot “surviv[e] a Rule 12(b)(6) motion by deliberately omitting . . .  
 22 documents upon which their claims are based . . . .” *Swartz*, 476 F.3d at 763 (internal quotations  
 23 omitted). Here, these disclosures are central to Plaintiffs’ allegations about private browsing.  
 24 Because the Complaint “necessarily relies upon” the disclosure displayed to Plaintiffs each time they  
 25 entered Incognito mode, they should be judicially noticed. *Coto*, 593 F.3d at 1038.

26 Google’s Chrome Privacy Notice (Exhibit 17) is also necessarily relied upon because Plaintiffs  
 27 allege that their invasion of privacy claim is based on “policies referenced” in Google’s Privacy Policy  
 28 and “other public promises [Google] made not to track or intercept the Plaintiffs’ communications . . .



1 while browsing in ‘private browsing mode.’” Compl. ¶ 134. Google’s Chrome Privacy Notice is a  
 2 policy referenced and linked to in Google’s Privacy Policy and a public disclosure related to “private  
 3 browsing mode.” Therefore, the Court should take judicial notice of the Chrome Privacy Notice  
 4 (Ex. 17).

5 Likewise, the page “How private browsing works in Chrome” (Ex. 19) and the page “Browse  
 6 in private” (Ex. 20) are public disclosures related to “private browsing mode” that are linked to from  
 7 the “Search & Browse Privately” page that is referenced in the Complaint (Ex. 18). Similarly, the  
 8 Google’s Privacy Policy referenced in the Complaint also links to the “Safeguarding your data” page  
 9 (Ex. 21). These pages are public disclosures related to Plaintiffs’ core allegations regarding what  
 10 Google said – and did not say – about “private browsing mode” and are linked to by pages referenced  
 11 in the Complaint. For these reasons, these Exhibits are likewise properly subject to judicial notice.

12 **B. All Exhibits to the Schapiro Declaration Are Properly Subject to Judicial Notice**  
 13 **as Publicly Available Websites**

14 Exhibits 1 through 25 are also the proper subject of judicial notice as publicly available  
 15 websites. The Chrome Incognito notice is publicly available to any person who enters Incognito mode  
 16 on Chrome (Exs. 1-2). Google’s current and all prior versions of its Privacy Policy (Exs. 3-15), Terms  
 17 of Service (Ex. 16), and Chrome Privacy Notice (Ex. 17) are publicly available at  
 18 <https://www.google.com/policies/terms/>, <https://www.google.com/policies/privacy/>, and  
 19 <https://www.google.com/chrome/privacy/>. Google disclosures about “private browsing” (Exs. 18-20)  
 20 and policies related to analytics and Advertising services (Exs. 21-25) are publicly available at  
 21 <https://support.google.com> and <https://developers.google.com>.

22 The content of these publicly available web pages is “not subject to reasonable dispute” and  
 23 “can be accurately and readily determined from sources whose accuracy cannot reasonably be  
 24 questioned.” Fed. R. Evid. Rule 201(b) & (b)(2). Therefore, these documents are subject to judicial  
 25 notice as they appear on publicly accessible websites and their authenticity cannot reasonably be  
 26 questioned. *See In re Yahoo Mail Litig.*, 2014 WL 3962824, at \*1025 (N.D. Cal. Aug. 12, 2014)  
 27 (Koh, J.) (taking judicial notice, *sua sponte*, of various publicly accessible websites); *Perkins*, 53 F.  
 28 Supp. 3d at 1204 (Koh, J.) (publicly accessible websites are proper subjects of judicial notice when



1 ruling on a motion to dismiss); *Datel Holdings Ltd. v. Microsoft Corp.*, 712 F. Supp. 2d 974, 983-84  
 2 (N.D. Cal. April 23, 2010) (taking judicial notice of limited warranty that is publicly available online).

3 Google is not offering these documents for the truth of their contents, but only to show that  
 4 they exist. Courts frequently take judicial notice of similar documents for this reason. *In re Google*  
 5 *Assistant Privacy Litig.*, 2020 WL 2219022 at \*5 (taking judicial notice of blog post “for the fact that  
 6 Google made the statements it contains, but not for the truth of those statements”); *Datel*, 712 F. Supp.  
 7 2d at 983-84 (taking judicial notice of an Xbox software license and terms of use and noting that these  
 8 documents were “judicially noticeable for the fact that they exist, not whether, for example, the  
 9 documents are valid or binding contracts”); *City and County of San Francisco v. HomeAway.com,*  
 10 *Inc.*, 21 Cal. App. 5th 1116, 1123 & n.2 (2018) (taking judicial notice of privacy policy not for its  
 11 truth but because “the fact that this policy exists is evidence that HomeAway subscribers and  
 12 customers were on notice of certain company policies when they shared personal information with  
 13 HomeAway”).

### 14 **III. CONCLUSION**

15 For the foregoing reasons, Google respectfully requests that the Court take judicial notice of  
 16 Exhibits 1 through 25 attached to the Schapiro Declaration.

17 DATED: August 20, 2020

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 SULLIVAN, LLP

20 By /s/ Andrew H. Schapiro

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